



SECURITIES AND EXCHANGE COMMISSION
[Release No. 34- 93731; File No. SR-NASDAQ-2021-066]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of the Valkyrie XBTO Bitcoin Futures Fund under Nasdaq Rule 5711(g)

December 7, 2021.

On August 23, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Valkyrie XBTO Bitcoin Futures Fund (“Trust”) under Nasdaq Rule 5711(g). On August 25, 2021, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on September 9, 2021.³

On September 29, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission has received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92865 (Sept. 2, 2021), 86 FR 50570 (Sept. 9, 2021) (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 93172, 86 FR 55071 (Oct. 5, 2021). The Commission designated December 8, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes to list and trade the Shares of the Trust under Nasdaq Rule 5711(g), which governs the listing and trading of Commodity Futures Trust Shares on the Exchange.

The investment objective of the Trust is for the Shares to reflect the performance of bitcoin as represented by the CME CF Bitcoin Reference Rate (“CME CF BRR”), less the Trust’s liabilities and expenses.⁸ The CME CF BRR aggregates the trade flow of major bitcoin spot platforms during a specific calculation window into a one-a-day reference rate of the U.S. dollar price of bitcoin.⁹ The Trust pursues its investment objective primarily by investing in bitcoin futures (“Bitcoin Futures”) that are cash-settled and traded on commodity exchanges registered with the Commodity Futures Trading Commission (“CFTC”).¹⁰ At expiration, the cash settlement amount for the Bitcoin Futures held by the Trust will be determined by comparing the price at which the Trust purchased the futures contract on the relevant futures exchange with the reference rate specified by that exchange on the expiration date.¹¹ The Trust does not invest in bitcoin or other digital assets directly. In addition to the Trust’s investments in Bitcoin Futures, the Trust expects to have significant holdings of cash and high-quality, short-term debt

⁷ See Notice, supra note 3.

⁸ See id. at 50574. Valkyrie Funds LLC (“Sponsor”) serves as the Trust’s sponsor and commodity pool operator; Vident Investment Advisory, LLC (“Sub-Advisor”) serves as the Trust’s sub-advisor and commodity trading advisor; and XBTO Trading, LLC is the research provider for the Sponsor and the Sub-Advisor. Delaware Trust Company serves as the trustee for the Trust. The Sponsor is currently considering third-party service providers for the roles of administrator, transfer agent, custodian, and marketing agent. See id. at 50571.

⁹ See id. at 50573 n.8. According to the Exchange, calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, itBit, and Kraken. See id.

¹⁰ See id. at 50574. The Exchange also represents that it will pursue its investment objective solely by holding Bitcoin Futures that are cash-settled and traded on the Chicago Mercantile Exchange, Inc. (“CME”). See id. at 50571.

¹¹ For example, the CME has specified that the reference rate for its Bitcoin Futures will be a volume-weighted composite of Bitcoin prices on multiple bitcoin platforms. See id. at 50574.

instruments that have terms-to-maturity of less than 397 days, such as U.S. government securities and repurchase agreements (“Money Market Instruments”).¹²

The net asset value (“NAV”) of the Trust will be determined in accordance with Generally Accepted Accounting Principles as the total value of bitcoin held by the Trust, plus any cash or other assets, less any liabilities including accrued but unpaid expenses. The NAV per Share will be determined by dividing the NAV of the Trust by the number of Shares outstanding. The NAV of the Trust is typically determined as of 4:00 p.m. E.T., on each day the Shares trade on the Exchange (“Business Day”). The Trust’s daily activities are generally not reflected in the NAV determined for the Business Day on which the transactions are effected (the trade date), but rather on the following Business Day. Bitcoin Futures traded on a U.S. exchange are generally valued using the last traded price before the NAV calculation time on the date with respect to which the NAV is being determined. Money Market Instruments will generally be valued at their market price using market quotations or information provided by a pricing service.¹³

On each Business Day, before commencement of trading in Shares during regular trading hours, the Trust will disclose on its website the portfolio that will form the basis for the Trust’s calculation of NAV at the end of the Business Day.¹⁴ The Trust’s website will provide an intra-day indicative value (“IIV”) per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange’s Regular Market Session (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day’s closing NAV per Share as a base and updating that value during the Exchange’s Regular Market Session to reflect changes in the value of the Trust’s NAV during the trading day.¹⁵ Intraday price information for Bitcoin Futures is available directly from the applicable listing venue and

¹² See id.

¹³ See id. at 50574-75.

¹⁴ See id. at 50582.

¹⁵ See id. at 50580.

through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants (as defined herein) and other investors. Intraday price quotations on Money Market Instruments of the type held by the Trust are available from major broker-dealer firms and from third-parties, and pricing information related to Money Market Instruments will also be available through issuer websites and publicly available quotation services such as Bloomberg, Markit, and Thomson Reuters.¹⁶

The Trust would issue and redeem Shares on a continuous basis at NAV per Share in large, specified blocks of Shares (“Creation Units”) in transactions with broker-dealers and large institutional investors that have entered into participation agreements (“Authorized Participants”). The Exchange currently anticipates that a Creation Unit will consist of 50,000 Shares, although this number may change from time to time. In addition, the Exchange currently expects that the Trust’s Creation Units will generally be issued and redeemed for cash.¹⁷

II. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2021-066 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁸ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

¹⁶ See id. at 50583.

¹⁷ See id. at 50579-80. Upon the request of an Authorized Participant made at the time of a redemption order, the Sponsor at its sole discretion may determine, in addition to delivering redemption proceeds, to transfer futures contracts to the Authorized Participant pursuant to an exchange of a futures contract for related position or to a block trade sale of futures contracts to the Authorized Participant. See id. at 50580.

¹⁸ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,¹⁹ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."²⁰

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,²¹ in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters' views on whether the proposed Trust and Shares would be susceptible to manipulation? What are commenters' views generally on whether the Exchange's proposal is designed to prevent fraudulent and manipulative acts and practices?
2. The Exchange asserts that "bitcoin and its surrounding ecosystem have evolved sufficiently to support the approval of a Bitcoin Futures ETF because the concerns the Commission has identified previously have been addressed."²² The Exchange also asserts that "the Bitcoin Futures market has sufficiently developed since the prior disapproval orders such that the market for Bitcoin Futures now resembles the market for other commodities at the time the related commodity futures-based ETP was approved for listing."²³ What are commenters' views regarding such assertions? Are the developments that the Exchange identifies sufficient to support a determination that the proposal to list and trade the Shares is designed to protect

¹⁹ Id.

²⁰ 15 U.S.C. 78f(b)(5).

²¹ See Notice, supra note 3.

²² See id. at 50571.

²³ See id. at 50575.

investors and the public interest and is consistent with the other applicable requirements of Section 6(b)(5) of the Act?

3. According to the Exchange, “[n]early every measurable metric related to CME Bitcoin Futures has trended consistently up since launch and/or accelerated upward in the past year.”²⁴ The Exchange asserts that “both the bitcoin and bitcoin futures markets have developed to the point that the CME Bitcoin Futures market is a ‘regulated market of significant size.’”²⁵ Based on data provided and the academic research cited by the Exchange, do commenters agree that the CME Bitcoin Futures market now represents a regulated market of significant size?²⁶ What are commenters’ views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares?

4. The Exchange states it believes that “trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market” because of the significant volume in the Bitcoin Futures market, the size of bitcoin’s market cap, and the significant liquidity available in the spot market.²⁷ What are commenters’ views on the Exchange’s assertion and the data provided by the Exchange to support such assertion?

5. The Exchange asserts that the CME CF BRR is not readily susceptible to manipulation due to the design of its methodology, which the Exchange believes adequately protects the Trust from potential price manipulation.²⁸ What are commenters’ views on these assertions?

6. The Exchange asserts the CME’s compliance with the CFTC’s Core Principles for Designated Contract Markets as set forth in the Commodity Exchange Act means that the Trust’s core asset (i.e., CME Bitcoin Futures) is “a well-regulated instrument that is not readily

²⁴ See id. at 50573.

²⁵ See id. at 50571.

²⁶ See id. at 50576-78.

²⁷ See id. at 50578.

²⁸ See id. at 50578-79.

susceptible to manipulation.”²⁹ The Exchange further asserts that CME Bitcoin Futures are not readily subject to manipulation or distortion because they are cash-settled and subject to real-time trade monitoring and comprehensive and accurate trade reconstruction.³⁰ What are commenters’ views regarding the Exchange’s assertions? Are the Exchange’s assertions sufficient to support the determination that the proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices and is consistent with the other applicable requirements of Section 6(b)(5) of the Act?

7. What are commenters’ views of the claim that the similarities of the operational characteristics and regulatory requirements applicable to bitcoin futures-based exchange-traded funds (“ETFs”) that both register the sale of their shares under the Securities Act of 1933 (“1933 Act”) and are regulated under the Investment Company Act of 1940 (“1940 Act”) and bitcoin futures-based exchange-traded products (“ETPs”) that register the sale of their shares under the 1933 Act but are not regulated under the 1940 Act are such that these types of products should not be treated differently by the Commission?³¹

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or

²⁹ See id. at 50579.

³⁰ See id.

³¹ The Commission previously made a similar request for comment in connection with statements made by a sponsor of a proposed bitcoin futures-based ETP similar to the Trust. See Securities Exchange Act Release No. 93534 (Nov. 8, 2021), 86 FR 63082, 63084 (Nov. 15, 2021) (SR-NYSEArca-2021-53) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change To List and Trade Shares of the Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200-E, Commentary .02) (Trust Issued Receipts) (citing to Letter from W. Thomas Conner, Vedder Price, on behalf of the sponsor, dated September 1, 2021, available at <https://www.sec.gov/comments/sr-nysearca-2021-53/srnysearca202153-9197848-249688.pdf>)).

any other provision of the Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³²

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2021-066 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2021-066. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed

³² Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-066 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-26860 Filed: 12/10/2021 8:45 am; Publication Date: 12/13/2021]

³³ 17 CFR 200.30-3(a)(57).